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STATUTES CITED

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 120

R. Q. BLACK, DOING BUSINESS AS SUPERIOR TRUCKING COMPANY,

Petitioner,

vs.

INTERSTATE COMMERCE COMMISSION,

Respondent

PETITION FOR CERTIORARI TO REVIEW JUDGMENT OF CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT OF PETITION.

To the Honorable the Supreme Court of the United States:

Petitioner, R. Q. Black, doing business as Superior Trucking Company, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Fifth Circuit rendered in the case of R. Q. Black, doing business as Superior Trucking Company, v. Interstate Commerce Commission, on May 12, 1948, affirming the judgment of the United States District Court for the Northern District of Georgia.

I

The Case

The Circuit Court of Appeals for the Fifth Circuit affirmed a judgment of the District Court which enjoined petitioner from transporting automobile parts. The judgment of the District Court was entered in an action brought by the Interstate Commerce Commission, as plaintiff, under the provisions of Sec. 222(b) of Part II of the Interstate Commerce Act (Title 49, U. S. C. A., Sec. 322(b)). Petitioner is the owner by transfer of a certificate, granted after hearing, which authorized, among other things, the transportation of machinery and machinery parts. The courts below, over the objections of this petitioner, considered oral evidence as to the scope of the operating rights conferred by the certificate and received evidence from an employee of the Commission as to his opinion of the scope of the certificate.

The effect of the judgment appealed from is to minimize part of the operating right conferred upon petitioner by eliminating therefrom machinery parts appertaining to the automobile field. The exact language of the certificate appears below.*

II

Jurisdiction to Grant the Writ

This Court has jurisdiction to review the judgment of the Circuit Court of Appeals under the provisions of Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (Title 28, U. S. C. A., Sec. 347(a)).

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* "Machinery and machinery parts, road construction machinery, contractor's equipment, structural and reinforcing steel, and commodities requiring special equipment, over irregular routes,

"Between points and places in Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee."

III

Questions Presented

(1) Whether, in an enforcement proceeding under Sec. 222(b) of the Interstate Commerce Act (Title 49, U. S. C. A., Sec. 322(b)), evidence relating to grandfather operations is admissible to limit the scope of a valid certificate of public convenience and necessity.

(2) Whether a certificate of public convenience and necessity issued under Sec. 208 of the Interstate Commerce Act (Title 49, U. S. C. A., Sec. 308) is subject to collateral attack in an enforcement proceeding.

(3) Whether a District Court has jurisdiction to hear evidence as to the meaning of the words used in a certificate of public convenience and necessity issued by the Interstate Commerce Commission.

(4) Whether judicial limitation of the scope of a valid certificate deprives the certificate holder of his property without due process.

IV

Reasons Relied On for the Granting of the Writ

(1) This is a case of first impression. The questions presented in this petition are of great general importance, and vitally affect the administration of the Motor Carrier Act of 1935 (49 Stat. at L. 543, Title 49, U. S. C. A., Sec. 301), now designated as Part II of the Interstate Commerce Act (54 Stat. at L. 898). The decision of the court below casts doubt upon the scope of over 10,000 certificates of public convenience and necessity granted under the so-called "grandfather clause" (Title 49, U. S. C. A., Sec. 308).

Prior to the decision of the court below, the universal rule has been that, once the certificate of public convenience

and necessity was granted by the Interstate Commerce Commission, and affirmed by the courts, that there could be no further limitation, modification or alteration of it, except as provided by the statute (Part II, Sec. 212(a) of the Interstate Commerce Act (Title 49, U. S. C. A., Sec. 312(a)) as to the revocation of certificates. The Commission has uniformly so held. This Court has approved the Commission's holdings. Under the decision of the Circuit Court of Appeals for the Fifth Circuit, limitations may be placed on any certificate granted in general terms through the device of "ascertaining the Commission's intention" by introduction of evidence as to the absence of grandfather operations with respect to a named commodity. The certainty which the Commission attempted to introduce by continuous hearings over a twelve year period is destroyed.

(2) The Circuit Court of Appeals in this case has decided two important questions of Federal law which have not been, but should be, settled by this Court: (1) The power of a District Court, in an enforcement proceeding under Sec. 222(b) of the Motor Carrier Act (Title 49, U. S. C. A., Sec. 322(b)) to hear evidence as to the grandfather operations of the certificate holder; (2) Whether the interpretation of the certificate is a matter of law, or is a question of fact to be decided upon the testimony of experts as to its meaning. These questions vitally affect the rights of over 10,000 holders of "grandfather" certificates.

(3) The decision of the Circuit Court of Appeals confers upon the District Courts a power of review which far exceeds the statutory power given a three judge court under the Urgent Deficiencies Act (Sec. 210 of the Judicial Code, Title 28, U. S. C. A., Sec. 47). The scope of review is in conflict with the decisions of this Court. The Circuit Court of Appeals held that the District Court may weigh the evidence as to grandfather operations in order to determine

the scope of the certificate. This Court, in *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 62 S. Ct. 722, 86 L. Ed. 971, held that the scope of the certificate involves a weighing of the evidence and is exclusively for the Commission. This Court affirmed (*Mem. Op.* 310 U. S. 609, 60 S. Ct. 898, 84 L. Ed. 1387) *Loving* v. *United States* (W. D., Okla.), which held that a three judge court is powerless to hear the evidence or review the proof submitted to the Interstate Commerce Commission in a direct review of the Commission's action. This Court approved, in *United States* v. *Seatrain Lines, Inc.*, 329 U. S. 424, 67 S. Ct. 435, 91 L. Ed. 396, the decisions of the Interstate Commerce Commission holding that the issuance of a certificate is final and marks the end of the proceedings just as the entry of a final judgment marks the end of a judicial proceeding (*Smith Bros., Revocation of Certificate*, 33 M. C. C. 465). (See *Campbell Sixty-Six Express, Inc.* v. *Frisco Transportation Co.*, 46 M. C. C. 222.)

(4) The decision of the Circuit Court of Appeals grants to the District Court a power which this Court has specifically denied to the Commission. The Circuit Court of Appeals held that, although the petitioner had authority to transport machinery parts, evidence was admissible, and the District Court could hold, that certain types of machinery parts were not intended to be included in the grant. In *United States* v. *Carolina Freight Carriers, Corp., supra*, this Court held that the Commission may not, in an application under the grandfather clause, "atomize his prior service, product by product, so as to restrict the scope of his operations."

(5) The decision of the Circuit Court of Appeals deprives petitioner of his property without due process of law, in that it permits a partial revocation of his certificate, in which he was given a property right under the Motor Car-

rier Act of 1935. The decision of the Circuit Court of Appeals is in conflict with *United States* v. *Seatrain Lines, Inc., supra.*

(6) The Interstate Commerce Commission, in a case decided after the decision of the Circuit Court of Appeals herein, has rejected the reasoning adopted by that court, and is in direct conflict with this case. *Coastal Tank Lines, Inc., et al.* v. *Charlton Bros. Transportation Co., Inc.*, No. MC-C-870, Interstate Commerce Commission, decided June 4, 1948. (See Appendix "B".)

Wherefore, petitioner prays that the petition for certiorari to review the judgment of the Circuit Court of Appeals be granted, and the judgment reversed.

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BRIEF IN SUPPORT OF PETITION

I

Opinions Below

The trial court filed a written opinion, containing findings of fact and conclusions of law, which was not officially reported. The opinion of the trial court is found in the record, pages 123 to 128, inclusive. The opinion of the Circuit Court of Appeals is reported in 167 F. 2d —.

II

Jurisdiction

The jurisdiction of this Court is invoked under Sec. 240(a) of the Judicial Code, as amended by the Act of February 13, 1925, (Title 28, U. S. C. A., Sec. 347(a)). The judgment of the Circuit Court of Appeals to be reviewed was entered May 12, 1948 (R. 139).

III

Statement of the Case

Petitioner was enjoined by the United States Court for the Northern District of Georgia from transporting or holding himself out to transport automobile parts, accessories and supplies in interstate commerce by motor vehicle without having a certificate of public convenience and necessity authorizing such operation (R. 129). The action was filed by the Interstate Commerce Commission under the provisions of Sec. 222(b) of Part II of the Interstate Commerce Act (Title 49, U. S. C. A., Sec. 322(b), (R. 2)). The Circuit Court of Appeals for the Fifth Circuit affirmed (R. 139).

Petitioner is the holder of a certificate of public convenience and necessity which authorizes the transportation of:

> "Machinery and machinery parts, road construction machinery, contractor's equipment, structural and rein-

forcing steel, and commodities requiring special equipment, over irregular routes,

"Between points and places in Alabama, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina and Tennessee." (R. 15.)

He admitted the transportation of automobile parts, claimed the right to transport them under this certificate (R. 6), and further alleged that he had purchased the certificate which had been granted under the "grandfather clause" from Grady Russell Wallace, doing business as Southeastern Transfer & Storage Company, and had a net investment therein of $9,500.00 (R. 8, 9); that he had purchased certain motor van trailers suitable for the transportation of automobile parts (R. 9), and that if he were not permitted to transport automobile parts, his property would be confiscated in violation of the Fifth Amendment to the Constitution of the United States (R. 10).

The District Court, sitting without a jury, heard the case on a stipulation as to facts and the testimony of witnesses. Petitioner took the position in the trial court that the question presented was a matter of law for the court (R. 52). The Interstate Commerce Commission, however, offered, and the court received, over objection, the testimony of two witnesses as to the scope of the operating rights conferred by the certificate. One, an employee of the Interstate Commerce Commission, was offered as an expert in the field of Motor Carrier Regulations, who testified that he had assisted in the drafting of legislation, studies and decisions of the Commission, and therefore knew the meaning of the language used by the Commission (R. 57, et seq.). Over objection, he testified that in his opinion the certificate, while authorizing the transportation of hundreds of items, did not authorize the transportation of automobile parts (R. 80, 81). He based his opinion on the terms used in *Classi-*

fication of Motor Carriers of Property, 2 MCC 703, (R. 60, *et seq.*). The second, an attorney, testified, over objection, that he had been the attorney representing Wallace in his application for the certificate, that no evidence had been offered by him as to the transportation of automobile parts, and that he did not recall that Wallace had transported them (R. 94, 95, 96).

The trial court found as a fact that the words "machinery and machinery parts" have a special meaning in the transportation industry which does not include automobile parts (R. 127), and based its opinion upon the opinion evidence of the "expert upon the Commission" and the evidence of the attorney for the original grantee (R. 123, 124). As to this evidence, the court held that, under applicable decisions of this Court, evidence should be heard as to the grandfather operations of a motor carrier in order to interpret the scope of its certificate of public convenience and necessity (R. 125).

Petitioner appealed from a judgment permanently enjoining him as prayed to the Circuit Court of Appeals for the Fifth Circuit, which affirmed the judgment of the court below (R. 135, *et seq.*).

IV

Assignments of Error

(1) The Circuit Court of Appeals erred in deciding that the petitioner's certificate of public convenience and necessity did not authorize the transportation of automobile parts.

(2) The Circuit Court of Appeals erred in deciding that testimony was admissible to explain the meaning of the words used by the Interstate Commerce Commission in petitioner's certificate of public convenience and necessity.

(3) The Circuit Court of Appeals erred in deciding that evidence as to the grandfather operations of the applicant for the certificate was admissible in evidence.

(4) The Circuit Court of Appeals erred in holding that the phrase "machinery and machinery parts" does not grant a general authority to transport all kinds of machinery and machinery parts.

(5) The Circuit Court of Appeals erred in construing petitioner's certificate of public convenience and necessity in such a way as to deprive him of operative rights in the certificate, in violation of the Fifth Amendment to the Constitution of the United States.

V

Summary of Argument

(1) Parol evidence is inadmissible to "explain" the meaning of the words used by the Interstate Commerce Commission in granting a certificate of public convenience and necessity.

(2) Evidence of grandfather operations is inadmissible.

(3) The courts may not restrict a general grant of authority in a certificate of public convenience and necessity by engrafting limitations as to particular products upon it.

(4) Petitioner's certificate, on its face, authorizes the transportation of automobile parts.

(5) A judgment limiting the scope of a general grant of authority in a certificate, to the extent of the limitation is a partial revocation of the certificate, and to the extent of the revocation deprives the holder thereof of property rights specifically recognized by the Motor Carrier Act of 1935 (Interstate Commerce Act, Part II, Title 49, U. S. C. A., Sec. 301, *et seq.*), is in violation of the provisions of the Fifth Amendment to the Constitution of the United States.

VI

ARGUMENT

(1) Opinion Evidence as to the Meaning of the Words Used in the Certificate Was Inadmissible

The Circuit Court of Appeals held that:

> "The rule has long been established that parol evidence is always admissible to explain the meaning in a particular trade or industry of terms used in a written instrument pertaining to that trade or industry."

It based its holding upon cases involving the interpretation of ambiguous contracts. This holding completely misconceives the nature of a certificate of public convenience and necessity granted by the Interstate Commerce Commission. Were this a certificate granted ex parte on application of the motor carrier, it is conceivable that the carrier's negotiations with the Commission leading up to the grant of the certificate might be admissible in an enforcement proceeding. Instead, however, this certificate was granted under quasi judicial procedure, subject to review by the courts, which culminated in the decision or final judgment, the applicant's certificate of public convenience and necessity.

We believe two rules to be equally well settled, and to be applicable to the case at bar. First, the testimony of an attache of an inferior court is inadmissible to qualify or explain the unambiguous terms of a decree of that court. *Lyon* v. *The Perin & Gaff Mfg. Co.*, 125 U. S. 698, 8 S. Ct. 1024, 31 L. Ed. 839. Second, if the Commission's action be deemed legislative, rather than judicial, the testimony of a legislator as to the intentions of the legislative body in the passage of a statute is inadmissible to explain the meaning of the words used in the statute. *Wiseman, Comm'r*

v. *Madison Cadillac Co.*, 191 Ark. 1021, 88 S. W. 2d 1007, 103 A. L. R. 1208.

Unquestionably, the language used by the Commission relates to the motor carrier industry. If there be questions, technical in their nature, in interpreting the certificate, Congress has provided that the Interstate Commerce Commission is the body to hear the evidence, and to interpret it in light of the conditions in the transportation industry. If a technical interpretation, in the light of conditions in the transportation industry, is required, the forum in which to secure it is the Interstate Commerce Commission. The courts should not attempt to usurp these functions, nor to permit a collateral attack upon a certificate through the guise of "interpretation." *Interstate Commerce Commission* v. *G. & M. Motor Transfer Co., Inc.*, 64 F. Supp. 302.

(2) Evidence of Grandfather Operations Is Inadmissible

The Circuit Court of Appeals held:

> ". . . recourse may generally be had to the facts and circumstances surrounding a case and to prior negotiations, for the purpose of determining the proper construction of the language of the contract."

From this premise, it concluded that the testimony of an attorney as to his recollections of the types of property transported by the original grandfather applicant was admissible, in order to ascertain the scope of the authority granted by the certificate.

The Interstate Commerce Commission has uniformly held that, once granted, a certificate of public convenience and necessity is conclusive in the absence of fraud, misrepresentation or mechanical error as to the grandfather rights of the certificate holder. It has stated that any other rule would contribute an intolerable uncertainty to the finality

of any right granted. *Manhattan Coach Lines, Inc., et al.* v. *Adirondack Transit Lines, Inc.*, 42 M. C. C. 123 (126).

This Court, in *United States* v. *Seatrain Lines, Inc.*, 329 U. S. 424, 67 S. Ct. 435, 91 L. Ed. 396, approved the Commission's determination as to the limitations upon its authority, and held that a certificate under the Interstate Commerce Act, once granted, was final. Even in cases arising under the Urgent Deficiencies Act (Title 28, U. S. C. A., Sec. 47), and brought to review the Commission, the courts have never assumed the power to hear the evidence as to grandfather operations, but have been limited to a determination as to whether or not the Commission's findings were supported by substantial evidence. *Loving* v. *United States*, 32 F. Supp. 464, affd. 310 U. S. 609, 60 S. Ct. 898, 84 L. Ed. 1387; *United States* v. *Carolina Freight Carriers Corp.*, 315 U. S. 475, 62 S. Ct. 722, 86 L. Ed. 971. The effect of the court's decision is to permit a trial *de novo* on the question of grandfather operations in the District Court in an enforcement proceeding, while the power to hear the evidence is denied a three-judge court. It is inconceivable that Congress could have intended to restrict the scope of review in the statutory appeal, only to leave it open in a collateral enforcement proceeding.

Since the decision in this case by the Circuit Court of Appeals, the Interstate Commerce Commission, through Division Five, has rejected the reasoning adopted by that court. Its decision in *Coastal Tank Lines, Inc., et al.* v. *Charlton Bros. Transportation Co., Inc., No. MC-C-870*, decided June 4, 1948 (see Appendix "B"), establishes that, had this case been heard by the Commission instead of the courts, the decision would have gone in petitioner's favor. That case, like this, arose on a complaint of unauthorized operations. The carrier's certificate authorized the transportation of "General Commodities," except for named items. The carrier was transporting bulk petroleum in tank trucks. There, as here, evidence was offered as to the

Commission's decision in Classification of Motor Carriers of Property, 2 MCC 703, to show that petroleum carriers (automobile haulers) fell into a separate classification, and were not included in the general grant. The understanding of shippers, the meaning of terms in the industry, and the intention of the Commission as shown by its practices were urged as items of evidence to disclose the meaning of the certificate. As to these contentions, the Commission said:

> "In the light of the foregoing, it is clear that in this proceeding, the sole criterion, as to whether the defendant is conducting unauthorized operations, is the terms of the certificate. In the *Campbell Sixty-Six case,* the Commission made it abundantly clear, that intentions or representations as to limitations of the type of service to be conducted, even when contained in reports under which certificates are issued, are of no significance in determinations of whether a service is being performed in accordance with the terms of the certificates. The definitions of commodity groups in the *Classification* case hardly can have greater significance when they are not referred to in the certificate."

The Commission concluded:

> "While it may be that when the certificate was originally issued to the defendant, petroleum products, in bulk, in tank trucks, should have been excepted from the grant of authority, they were not, and we may not now by interpretation, so modify the certificate. Such action in the circumstances here disclosed would amount to a partial revocation of the defendant's certificate without benefit to it of the procedure provided in section 212(a) of the act. Compare *Tidewater Transfer Company, Inc., Extension—Wines in Bulk,* M. C. C., No. MC-68274 (Sub-No. 5), decided August 28, 1947.
>
> "We conclude that the term general commodities, without restrictions, means all types of commodities; that the *Classification* case is not controlling here of the commodities that defendant may transport; that mat-

ters antecedent to the issuance of the defendant's certificate are not appropriate for consideration in the construction of the plain terms of the certificate; and that the commodity descriptions (1) and (2), hereinbefore referred to, in defendant's consolidated certificate issued October 9, 1944, do not prohibit the transportation of petroleum products, in bulk, in tank trucks."

(3) The Phrase, "Machinery and Machinery Parts," Should Not Be Converted into a Limited Grant of Specific Kinds of Machinery Parts.

The Circuit Court of Appeals held:

> "If the phrase 'machinery and machinery parts' were to be given the broad meaning contended for by appellant, it could conceivably be tortured into covering the transportation of every kind of machinery and machinery parts now known, or to be known in the future. The defendant, under this certificate, could then usurp and monopolize the transportation of practically all machinery in the territory covered by this certificate, to the exclusion of every permit heretofore granted by the Commission."

Having adopted the premise that the court was the forum to pass upon the scope of the grandfather operations, in the same manner as though the proceeding were one before the Commission to secure a certificate, the court impliedly creates an additional condition for the petitioner to meet, namely, that public convenience and necessity would be served through the exercise of the rights granted under his certificate.

Sec. 206(a) of the Interstate Commerce Act (Title 49, U. S. C. A., Sec. 306(a)) provides that grandfather certificates shall be issued "without requiring further proof that public convenience and necessity will be served by such

operation." Even in cases involving a direct review of the Commission's grant or refusal of a certificate, it has been uniformly held that the precise delineation of an enterprise which seeks to bring itself within the protection of the grandfather clause is a matter reserved for determination by the Commission. *Noble* v. *United States,* 319 U. S. 88, 63 S. Ct. 950, 87 L. Ed. 1277.

We believe the language of this Court in *United States* v. *Pierce Auto Freight Lines, Inc.,* 327 U. S. 515, 66 S. Ct. 687, 90 L. Ed. 821, states the applicable rule:

> "It is not true, as the opinion stated, that '. . . the courts must in a litigated case, be the arbiters of the paramount public interest.' This is rather the business of the Commission, made such by the very terms of the statute. The function of the reviewing court is much more restrictive. . . . It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, . . ."

If a decision of this case requires evidence as to conditions in the transportation industry, that evidence should be heard by the Interstate Commerce Commission in a proceeding to determine the interpretation of the certificate in light of conditions prevailing in the transportation industry. See *Byers Transportation Co.* v. *United States,* 48 F. Supp. 550 (554).

(4) The Certificate Authorizes the Transportation of Automobile Parts

The Circuit Court of Appeals stated that:

> "It becomes patent from an examination of the certificate in question that it was not intended to include in its scope the transportation of automobile parts."

We believe it to be equally patent that the certificate is unambiguous, and on its face authorizes the transportation of parts of automobiles and all other machinery, without limitation. To paraphrase the opinion of the Circuit Court of Appeals, specifically the certificate authorizes the transportation of five different classes or types of property. Three are grants of authority to carry specific types of property. These three are: road construction machinery; contractors' equipment, structural and reinforcing steel. In addition, the certificate makes two general grants of authority: machinery and machinery parts; and commodities requiring special equipment. As to the first group, it seems obvious that it was the Commission's intention to grant authority to haul these specific commodities, based upon grandfather operations relating to this type of transportation. As to the second group, it would appear that it was the Commission's intention to grant general authority to transport all commodities falling into these generic classifications. That automobile parts are comprehended within the general classification of machinery parts seems not to be open to debate. The opinion of the District Court, which directly, and that of the Circuit Court of Appeals, which by implication, holds that "machinery parts" does not include automobile parts, can only be based upon a misapprehension of the functions of the courts in enforcement proceedings under Sec. 222(b) of the Interstate Commerce Act (Title 49, U. S. C. A., Sec. 322(b)). The only question of fact for decision in an enforcement proceeding is whether or not the shipper has engaged in transportation as alleged. If a certificate of public convenience and necessity is pleaded as authority for the transportation, the court must decide, as a question of law, whether the certificate's language includes the transportation proved—and the burden is upon the complainant to prove that the transporta-

tion is unlawful. See *Campbell Sixty-Six Express, Inc.* v. *Frisco Transportation Co.*, 46 M. C. C. 222. Only by placing upon the carrier the burden of proving that grandfather operations included the specific commodity, the transportation of which is sought to be enjoined, can the court reach a conclusion that the transportation of automobile parts is not authorized under the certificate in question.

(5) The Decision Below Deprives Petitioner of Property Without Due Process, in Violation of the Fifth Amendment.

The Court below, although the question was raised, did not pass upon the constitutional question. Its opinion, however, assumes that the courts have the power to modify, alter, or partially revoke a certificate of public convenience and necessity upon the court's determination of the extent of grandfather operations and the public convenience to be served.

It is undisputed that, in reliance upon the unambiguous terms of the certificate, petitioner expended, to him, large sums of money, which is now lost (R. 106). Since the certificate grants rights to engage in a business of public nature, the grant of authority which it contains is protected by the Fifth Amendment to the Constitution. The statute reserves no right to revoke it, except upon specified conditions which are not met here. By subsequent administrative action, this right can not subsequently be impaired. *Frost* v. *Corporation Commission of the State of Oklahoma*, 278 U. S. 515, 49 S. Ct. 235, 73 L. Ed. 483.

We do not believe that the courts are given any greater right to terminate or revoke any lawfully granted certificate of public convenience and necessity. The limitations upon the Commission's authority, as approved in *Seatrain Lines, Inc.* v. *United States*, 64 F. Supp. 156, affd. 329 U. S. 424,

67 S. Ct. 435, 91 L. Ed. 396, are equally applicable to the District Courts.

(6) The Writ Should Be Issued

In the thirteen years since the passage of Part II of the Interstate Commerce Act (Title 49, U. S. C. A., Sec. 301, *et seq.*), over 10,000 applications for certificates of public convenience and necessity have been granted under the grandfather clause. Many of them have been granted only after numerous hearings and rehearings, in which all of the questions as to limitations, exceptions, and the precise scope of the certificate have been argued and reargued. The purpose of the Commission's efforts was to frame, in each certificate of public convenience and necessity, a definition of the scope and authority of each grandfather applicant. It had been believed, prior to the decision of the Circuit Court of Appeals for the Fifth Circuit, that it was no longer necessary to preserve the records of operations during the grandfather period. The decision of the court below opens a veritable Pandora's box, releasing for litigation at the instance of the Commission or by competitive interests all of the questions which the Commission settled in the proceedings before it. Unless a clear definition of the limits of the courts' authority under an enforcement proceeding under Sec. 222(b) of the Interstate Commerce Act (Title 49, U. S. C. A., Sec. 322(b)) is made, carriers and the Commission can in the District Courts secure a trial *de novo* on the questions which should have been concluded by the grant or refusal of a certificate of public convenience and necessity, and which can not be retried before the Commission.

We respectfully submit that this case, one of first impression, presents Federal questions of importance involving

the entire transportation industry which should be settled by this Court.

Respectfully submitted,

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Attorneys for Petitioner.

APPENDIX "A"

Sections of Part II, Interstate Commerce Act, Cited

Sec. 206(a) (Title 49, U. S. C. A., Sec. 306(a)): Certificate of convenience and necessity—(a) Necessity for; motor carriers in bona fide operation on June 1, 1935.—Except as otherwise provided in this section and in section 210a, no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 210, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate was made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after October 1, 1935, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 207(a) of this chapter and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: *And provided further,* That this

paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any State to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall. however, be otherwise subject to the jurisdiction of the Commission under this chapter.

Sec. 208(a) (Title 49, U. S. C. A., Sec. 308 (a)): Terms and conditions of certificate—(a) Specification of routes and termini; extension of routes; restriction on additions to equipment.—Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204(a) (1) and (6): *Provided, however,* That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

Sec. 212(a) (Title 49, U. S. C. A., Sec 312(a)): Suspension, change, revocation and transfer of certificates, permits and licenses.—(a) Certificates, permits, and licenses shall be effective from the date specified therein, and shall

remain in effect until suspended or terminated as herein provided. Any such certificate, permit, or license may, upon application of the holder thereof, in the discretion of the Commission, be amended or revoked, in whole or in part, or may upon complaint, or on the Commission's own initiative, after notice and hearing, be suspended, changed, or revoked, in whole or in part, for willful failure to comply with any provision of this chapter, or with any lawful order, rule, or regulation of the Commission promulgated thereunder, or with any term, condition, or limitation of such certificate, permit, or license: *Provided, however,* That no such certificate, permit, or license shall be revoked (except upon application of the holder) unless the holder thereof willfully fails to comply, within a reasonable time, not less than thirty days, to be fixed by the Commission, with a lawful order of the Commission, made as provided in section 204(c), commanding obedience to the provision of this chapter, or to the rule or regulation of the Commission thereunder, or to the term, condition, or limitation of such certificate, permit, or license, found by the Commission to have been violated by such holder: *And provided further,* That the right to engage in transportation in interstate or foreign commerce by virtue of any certificate, permit, license, or any application filed pursuant to the provisions of section 206, 209, or 211, or by virtue of the second proviso of section 206(a) or temporary authority under section 210a, may be suspended by the Commission, upon reasonable notice of not less than fifteen days to the carrier or broker, but without hearing or other proceedings, for failure to comply, and until compliance, with the provisions of section 211(c), 217(a), or 218(a) or with any lawful order, rule, or regulation of the Commission promulgated thereunder.

Sec. 222(b) (Title 49, U. S. C. A., Sec. 322(b)): Unlawful operation—(b) Jurisdiction of district courts to restrain violations and enforce orders.—If any motor carrier or broker operates in violation of any provision of this chapter (except as to the reasonableness of rates, fares, or charges and the discriminatory character thereof), or any rule, regulation, requirement, or order thereunder, or of any term or condition of any certificate or permit, the Commission or

its duly authorized agent may apply to the district court of the United States for any district where such motor carrier or broker operates, for the enforcement of such provision of this chapter, or of such rule, regulation, requirement, order, term, or condition; and such court shall have jurisdiction to enforce obedience thereto by a writ of injunction or by other process, mandatory or otherwise, restraining such carrier or broker, his or its officers, agents, employees, and representatives from further violation of such provision of this chapter or of such rule, regulation, requirement, order, term, or condition and enjoining upon it or them obedience thereto.

SECTION OF URGENT DEFICIENCIES ACT CITED

Title 28, Judicial Code, Sec. 47 (as far as pertinent): Interlocutory injunctions as to orders of Interstate Commerce Commission; appeal to Supreme Court.—No interlocutory injunction suspending or restraining the enforcement, operation, or execution of, or setting aside, in whole or in part, any order made or entered by the Interstate Commerce Commission shall be issued or granted by any district court of the United States, or by any judge thereof, or by any circuit judge acting as district judge, unless the application for the same shall be presented to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a circuit judge, and unless a majority of said three judges shall concur in granting such application. When such application as aforesaid is presented to a judge, he shall immediately call to his assistance to hear and determine the application two other judges. . . . The hearing upon such application for an interlocutory injunction shall be given precedence and shall be in every way expedited and be assigned for a hearing at the earliest practicable day after the expiration of the notice hereinbefore provided for. An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final

hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. (Oct. 22, 1913, c. 32-38 Stat. 220).

APPENDIX "B"

Decision of the Interstate Commerce Commission in Coastal Tank Lines, Inc., et al. v. Charlton Bros. Transportation Company, Inc., No. MC-C-870 (Abridged), Is Set Out Below for the Convenience of the Court.

"Submitted September 29, 1947. Decided June 4, 1948

Defendant, Charlton Bros. Transportation Company, Inc., found not to have conducted unauthorized motor common carrier services. Complaint dismissed.

Harold G. Hernly and Dale C. Dillon for complainants. Harry S. Elkins, Martin Sack, and Edward M. Berol for interveners in support of complaints. Spencer T. Money for defendant.

REPORT OF THE COMMISSION

Division 5, Commissioners Lee, Rogers, and Patterson, by Division 5:

Exceptions were filed by complainants and interveners, other than Petroleum Carrier Corporation, to the recommended order of the examiners and the defendant replied.

By complaint filed October 14, 1946, Coastal Tank Lines, Inc., of York, Pa., and M. I. O'Boyle & Son, Incorporated, of Washington, D. C., motor common carriers of petroleum products, in bulk, in tank trucks, allege (1) that the order entered on October 6, 1938, in *Charlton Bros. Transp. Co., Inc., Com. Car. Application*, 9 M. C. C. 722, and the certificate issued to the defendant pursuant to the findings in the cited proceeding and certain other proceedings, were erroneous in that they failed to exclude authority to transport petroleum products, in interstate or foreign commerce, without ap-

propriate authority from this Commission. We are asked to find that the order of October 6, 1938, was issued through a mistake of fact, to revoke or modify the certificate so as to prohibit the transportation of petroleum products, in bulk, in tank trucks, and to require the defendant to cease and desist from the alleged violations of the Interstate Commerce Act. E. Brooke Matlack, Inc., The Leaman Transportation Company, Inc., and the Leaman Transportation Corporation, all of them motor common carriers of petroleum products, in bulk, in tank trucks, intervened in behalf of the complainants. Subsequent to the hearing herein, Lang Transportation Corporation and Petroleum Carrier Corporation were permitted to intervene.

It will be observed that the allegations of the complaint are inconsistent in that it is alleged both that authority was improperly issued and that defendant has no authority. However, in their brief, the complainants and certain interveners made it clear, that they do not seek revocation or modification of the certificate issued to the defendant but, rather, they seek a finding that the defendant's certificate does not authorize the transportation of petroleum products, in bulk, in tank trucks, and an order for defendant to cease and desist from performing such transportation, and for the striking from our files of the defendant's tariffs, which contain rates on petroleum products, in bulk, in tank trucks. Thus, the complaint is to be viewed as alleging only that the defendant is transporting petroleum products, in bulk, in tank trucks, in interstate or foreign commerce, without authority. In connection with the foregoing, on exceptions, complainants and certain of the carriers which intervened at the hearing refer to the fact that they had concurrently filed a petition for reconsideration of the orders of October 6, 1938, in No. MC-29647, and of October 6, 1941, in No. MC-100329 [1], for the purpose of "correcting the inadvertent error and mistake of fact, in failing to specify in the exceptions to each of the general commodity grants of authority ordered therein," * * * petroleum products, in bulk, in tank

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[1] In this proceeding, the issuance of a certificate to John I. Rogers, a predecessor of the defendant, was authorized.

trucks." Such petition was, however, denied by the Commission by order of September 4, 1947.

The present operating rights of the defendant to engage in transportation in interstate or foreign commerce, so far as here pertinent, are evidenced by a consolidated certificate of public convenience and necessity, No. MC-29647, issued to it on October 9, 1944. That certificate embraces authority granted in connection with, among others, a "grandfather" proceeding, under section 206 (a) of the act, in *Charlton Bros. Transp. Co., Inc., Com. Car. Application, supra,* an extension application, under section 207 of the act, in *Charlton Bros. Transp. Co., Inc., Extension of Operations,* 34 M.C.C. 832, and a purchase of operating rights, under section 5, in *Charlton Bros. Transp. Co., Inc. —Purchase—Rogers,* 39 M.C.C. 229 and 610. The consolidated certificate authorizes the defendant to engage in transportation, in interstate or foreign commerce, as a common carrier by motor vehicle, over regular and irregular routes, between certain points or territories in Maryland, Pennsylvania, Virginia, and West Virginia. It contains three descriptions, each relating to different points or territories, of the kind of commodities defendant may transport. These are:

1. General commodities, except livestock, and except dangerous explosives, coin or currency, household goods, in truckloads, as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M.C.C. 467, coal, sand, crushed stone, and lime.

2. General commodities, except dangerous explosives, and except commodities of unusual value, and household goods as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M.C.C. 467,

3. General commodities, except livestock, explosives (not including small arms ammunition), currency, bullion, household goods as defined in *Practices of Motor Common Carriers of Household Goods,* 17 M.C.C. 467, and loose bulk goods requiring special equipment.

There is no question, and none of the parties makes any claim, that the defendant may not transport petroleum

products, in bulk, in tank trucks, under the third description above, which specifically excludes, among other things, "loose bulk goods requiring special equipment." The term "special equipment" includes tank trucks. *Meddock Extension of Operations—Refrigerator Service,* 30 M.C.C. 301. The principal question here is whether, in the descriptions 1 and 2 above set forth, the term "general commodities" includes petroleum products, in bulk, in tank trucks. The defendant has transported petroleum products, in tank trucks, between the points between which it is authorized to transport the commodities shown in descriptions 1 and 2 above, such transportation having been instituted some time after the hearing on its "grandfather" clause application. The complainants and interveners, hereinafter for convenience collectively called complainants, specialize in the transportation of petroleum products, and certain of them, to some extent, have felt the competition of the defendant's service. They contend that the term general commodities does not include petroleum products, in tank trucks, and that the transportation thereof by the defendant is performed without the authority granted to it by this Commission. The defendant, although admitting that it transported or transports petroleum products, in tank trucks, denies that it is operating without the terms of its certificate. It contends that the term general commodities includes all types of commodities except those expressly excluded.

* * * * * * *

The examiners found herein that the defendant has not conducted an unauthorized operation by reason of having transported, under commodity descriptions 1 and 2 above, petroleum products, in bulk, in tank trucks. On exceptions, the complainants contend generally that in order to interpret the certificate properly, the Commission's practice at the time the first certificate was authorized to be issued to the defendant, October 6, 1938, must be ascertained. They assert that it was not then the practice specifically to expect from general-commodity grants of authority, commodities requiring special equipment, and that this practice was not commenced until some time in 1940. They concede the correctness of the examiners' conclusion that commodity de-

scriptions in a certificate are not subject to the definitions contained in *Classification of Motor Carriers of Property,* 2 M.C.C. 703, hereinafter called the *Classification case,* but they urge that those definitions should not be entirely disregarded. They take the position that the finding in that case that motor carriers of general freight comprise "common and contract carriers transporting commodities generally, except such commodities as require special equipment or service," is very strong evidence of the meaning of the term general commodities "when such term was used at a time when there was no other standard by which to measure the meaning or scope thereof."

In the *Classification case,* in discussing the need for the classification, it was stated that the classification would facilitate the process of regulation particularly from the standpoint that the separate types of carriers would require differing characters of regulation. Thus, special requirements, rules, or regulations intended to apply to one type or to a few types only, could be avoided so far as other types are concerned. In this connection, division 5 also held:

> It is obvious that such classification is particularly important at this time in connection with the issuance of certificates, permits, and licenses, as it will facilitate the identification and description of the operations to be covered thereby. The problem of classification is made difficult, however, by the fact that a very large proportion of the operators who are subject to the act now have "grandfather" rights. *It is not always easy to fit such operators into a definite classification.* (Emphasis supplied).

An examination of a large number of reported decisions discloses that authority rarely has been granted in terms which indicated that the commodity descriptions were subject to the definitions set forth in the *Classification case.* A notable exception, however, is seen in the many instances in which the authority to transport household goods, or the restriction against the transportation of household goods, specifically referred to the definition of household goods contained in the *Classification case,* and later to the

definition of household goods set forth in *Practices of Motor Common Carriers of Household Goods,* 17 M.C.C. 467, which superseded the former definition. Generally, these references in the findings of the reports were carried forward in the certificates of public convenience and necessity that issued.

Complainants urge that the motor carrier industry and shippers generally understand that the term general commodities excludes the transportation of articles requiring special equipment, and that the Commission has, at least since the time of the *Classification case,* recognized a distinction between general-commodity carriers and special-commodity carriers utilizing special equipment. They contend, in effect, that the term general commodities when used in a certificate is a limitation on the type of equipment which the carrier may use and excludes the right to use special equipment such as tank trucks. In respect of this contention, the record contains statements made by representatives of the complainants, that they understand the term general commodities to mean articles in packages or containers or articles that can be transported in an ordinary motor vehicle as distinguished from a tank truck. There is no evidence in this record which would warrant a finding that usage or custom has developed the special or limited construction of the term urged by the complainants. It is true, as these parties contend, that the Commission has recognized that there are several classifications of motor carrier, and these are set forth generally in the *Classification case.* However, it also recognized at the time of that decision that with respect to carriers having "grandfather" rights "it is not always easy to fit such operations into a definite classification." It does not follow that commodity descriptions in certificates, not otherwise restricted, are to be interpreted from the standpoint of these classifications. Rather, the kind of commodities which a carrier is authorized to transport, the type of carrier, that is, common, contract, private, or exempt, and the type of carrier's service, such as regular route and irregular route, are factors to be considered in a determination of the classification of a carrier.

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We have thus far referred in our discussion to the practice of division 5 in describing commodity-authorizations in reports decided prior to the proceeding in which the defendant's certificate was originally issued. From the foregoing, it may be reasonably concluded that the *Classification case* contains no language which may be fairly construed as making commodity descriptions in certificates subject to the definitions set forth therein. And the instances in which certificates make specific reference to the definitions of commodity descriptions contained in the *Classification case*, as in the case of the description of household goods, negatives any idea that these definitions are applicable when such reference is not made. If, as contended by the complainants, the term general commodities was originally intended to exclude commodities requiring special equipment or service, it would have been unnecessary to specify in the certificates any exceptions falling within that category. However, in the proceedings in which the defendant's original certificates were authorized to be issued as well as in a number of proceedings decided immediately prior thereto, there was excepted from the general-commodity authorizations certain commodities which either required special equipment or special service. In the circumstances, it would be illogical, in such instances, to conclude that in addition to the commodities expressly excepted it was also intended to except petroleum products, in bulk, in tank trucks, where such commodities were not specifically excluded.

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From the foregoing, the only reasonable conclusion that can be reached is that, at and since the time of the original grant of authority to the defendant, the term general commodities has been considered by the Commission to include all commodities other than those expressly excepted.

The complainants claim that at the time the original certificate was issued to the defendant, it, other interested parties, and the Commission, understood that the term general commodities did not include authority to transport petroleum products, in tank trucks. They refer to *United*

States v. Seatrain Lines, — U. S. —, decided January 6, 1947, as authority for the alleged principle that certificates shall be interpreted according to the understandings of the parties and the Commission at the time the certificates are issued. We find no support in the Supreme Court's decision for the claimed principle. In that case the question was whether the Commission had the power to modify a certificate of public convenience and necessity theretofore issued to a carrier by water subject to Part III of the act. In disposing of the contention that the issuance of the certificate was inadvertent, the Court stated that the matter antecedent to the issuance of the certificate, such as Seatrain's application for its certificates, the information supplied to the Commission, and the findings of the Commission, indicate that it was the understanding of the Commission and Seatrain that it transported general commodities. Clearly, the finding made by the Court with respect to the so-called understanding of the Commission and Seatrain is not in point in the instant proceeding. For one thing, as pointed out by complainants, where the terms of a certificate are patently ambiguous, as was the case in *Manhattan Coach Lines, Inc., v. Adirondack Transit Lines,* 43 M. C. C. 477, it is proper to consider antecedent matters in order to ascertain the true meaning. There is no ambiguity in the language of defendant's certificate here. The only question here is whether the defendant is conducting unauthorized operations. The answer to that question must be found in the language contained in the certificate.

In *Campbell Sixty-Six Exp., Inc.,* v. *Frisco Transp. Co.,* 46 M. C. C. 222, the Commission considered the question of whether the defendant motor common carrier, hereinafter called Frisco, a subsidiary of a railway company, was conducting unauthorized operations under the certificates of public convenience and necessity held by it. The operating rights represented by such certificates were acquired by purchases approved under what is now section 5 of the act. The service performed by Frisco was of the same character as the service performed by motor common carriers generally. Frisco at the time it sought approval of the acquisition made representations that it would only conduct opera-

tions which were auxiliary to or supplemental of rail service of its parent company, and there was an intent, as indicated in the reports which approved the acquisitions, to limit the service accordingly. But the certificates issued to Frisco contained no restrictions so limiting its service. In deciding that its operations were authorized, the Commission said:

> "The certificates of public convenience and necessity which we issue should state clearly and unequivocally the service which may be performed by the carriers to which they are issued. Section 208(a) of the act requires that any certificate issued under section 206 or 207 shall specify, among other things, the service to be rendered, *and motor common carriers and others interested are not required to go back of the certificates to determine the nature and extent of the service authorized.* Here we may look only to the certificate held by the Transportation Company to determine whether it is engaging in unauthorized operations. (Emphasis supplied.)

As pointed out by the complainants, the Commission went on to say that the foregoing statement was not to be construed as precluding it from correcting the certificates to reflect the intent of the findings in the acquisition proceedings or from imposing restrictions so as to limit the service to one auxiliary to or supplemental of rail service. Complainants attach some significance to this expression and apparently consider that it supports their contentions in the instant proceeding. However, the Commission there had reference to modifications of the certificates which might be made at some future time because of possible inadvertence in issuing the certificates (which it did not determine in that proceeding), or the imposition of restrictions *as provided for in the terms of the certificates.* Similar questions are not before us here.

In the light of the foregoing, it is clear that in this proceeding, the sole criterion, as to whether the defendant is conducting unauthorized operations, is the terms of the certificate. In the *Campbell Sixty-Six case,* the Commission made it abundantly clear, that intentions or rep-

resentations as to limitations of the type of service to be conducted, even when contained in reports under which certificates are issued, are of no significance in determinations of whether a service is being performed in accordance with the terms of the certificates. The definitions of commodity groups in the *Classification case* hardly can have greater significance when they are not referred to in the certificate.

In none of the application proceedings decided prior to that in which the defendant's original certificate was issued; has the term "general commodities" been expressly defined, although in one such proceeding it was concluded that the particular applicant should be treated as a carrier of general freight as defined in the *Classification case.* In the other previous proceedings, however, by reason of the many instances in which certain commodities or classes of commodities were specifically excluded from the general commodity authorizations, it must necessarily be implied that the Commission intended to and did authorize the transportation of all commodities not expressly excluded.

With the exception of *Watson-Purchase-Comet Motor Exp. Co., supra,* and *C. & U. Tank Lines, Inc.-Purchase-Comet Motor Exp. Co., supra,* the reports of the Commission clearly demonstrate that certificates are to be construed only by their terms, and that the term "general commodities" includes all types of commodities, except those specifically excluded. The findings in the two proceedings last cited do not appear to be reconcilable with the practice and course, hereinbefore discussed, of the Commission as set forth in other reports. In this connection a petition for reconsideration is pending in the last-cited proceeding. We believe the weight of authority supports the conclusion that the term "general commodities" in certificates of public convenience and necessity means all types of commodities, except to the extent restricted. To hold, for example, that two certificates, one containing authority to transport general commodities without exceptions, and another, authority to transport general commodities, except petroleum products, in bulk, in tank trucks, grant identical operating rights, is to do violence to the plain meaning of the terms of the certificate. Interpretations of certificates based on

classifications of motor carriers, or on the basis of matters antecedent to the issuance of a certificate, the terms of which are not patently ambiguous, can only lead to instability in the motor carrier industry and uncertainty among their patrons as to the operating rights of motor carriers. Here there is no ambiguity in the terms of defendant's certificate, to the extent in question, and only the terms of the certificate may be looked to in determining its operating rights.

A final argument advanced by complainants needs to be considered. In the light of the examiners' conclusions that commodity descriptions in a certificate are not subject to the definitions contained in the *Classification case,* unless the certificate by its terms refers to such definitions, complainants argue that under such reasoning definitions, such as for dangerous explosives, which are contained in the Commission's safety regulations, when not referred to in a certificate, must likewise be disregarded. On this basis, they contend that since the defendant is specifically prohibited by the terms of its certificate from transporting dangerous explosives, and since the generic term "explosives" included inflammable liquids such as gasoline and kerosene, that the defendant is accordingly precluded from transporting "all liquids which give off inflammable vapors." It is unnecessary for us to make any determination of the term "explosives" as that term is not used in the particular commodity descriptions here in question. Defendant is precluded from transporting "dangerous explosives" but that term has never been considered by us to include inflammable liquids. See *Novick Extension of Operations-Explosives,* 34 M. C. C. 693.

While it may be that when the certificate was originally issued to the defendant, petroleum products, in bulk, in tank trucks, should have been excepted from the grant of authority, they were not, and we may not now by interpretation, so modify the certificate. Such action in the circumstances here disclosed would amount to a partial revocation of the defendant's certificate without benefit to it of the procedure provided in section 212(a) of the act. Compare *Tidewater Transfer Company, Inc., Extension-Wines in*

Bulk, — M. C. C. —, No. MC-68274 (Sub. No. 5), decided August 28, 1947.

We conclude that the term general commodities, without restrictions, means all types of commodities; that the *Classification case* is not controlling here of the commodities that defendant may transport; that matters antecedent to the issuance of the defendant's certificate are not appropriate for consideration in the construction of the plain terms of the certificate; and that the commodity descriptions (1) and (2) hereinbefore referred to, in defendant's consolidated certificate issued October 9, 1944, do not prohibit the transportation of petroleum products, in bulk, in tank trucks.

We find that the defendant has not conducted an unauthorized operation by reason of having transported, under commodity descriptions (1) and (2), hereinbefore set forth, contained in certificate No. MC-29647, issued to the defendant on October 9, 1944, petroleum products, in bulk, in tank trucks; and that the complaint should be dismissed.

An order dismissing the complaint will be entered.

Commissioner Rogers concurs in the result."